Volume 9 | Issue 1

5-1905

The Forum - Volume 9, Issue 8

THE FORUM.

VOL. IX. MAY, 1905. No. 8

Subscription, $1.25 per annum, payable in advance.

A REVIEW OF ULRICH V. REINOEHL

143 PA: 238 AND GERMANE AUTHORITIES

Some time since during a conversation with a valued friend, whose perspicacity in matters legal is widely recognized, the discussion turned upon capricious opinions handed down by courts, and incidentally the writer called attention to the case which forms the caption of this article, with its rule of law in reference to the quantum of insurable interest a creditor may have in the life of his debtor. The result was a request to contribute some observations upon the above mentioned case.

INSURABLE INTEREST GENERALLY

In Appeal of Corson, 113 Pa. 438, Clark, J., defining insurable interest in life policies said, "An insurable, however, is not necessarily a definite pecuniary interest, such as is recognized and protected at law, it may be contingent, restricted as to time, or indeterminate in amount, but it must be actual, such as will reasonably justify a well grounded expectation of advantage, dependent upon the life insured, so that the purpose of the party effecting the insurance may be to secure that advantage and not merely to put a wager upon human life." This benefit accruing from the continuance of the life insured or consequent detriment suffered by the termination of the same, may grow out of a relationship based upon blood, marriage, or commercial intercourse, and possibly certain close social ties. Carpenter v. Ins. Co. 161 Pa. 9. A policy devoid of such insurable interest is anathematized as a gambling contract and *contra bonos mores*. U. B. Mut. Aid v. McDonald, 122 Pa. 324. Of such contracts, Paxson, C. J., uses the following forceful language in Ulrich v. Reinoehl: "The law very properly lays a mailed hand upon speculative life insurance; of all the forms of gam-

bling it is one of the most objectionable. The records of our own court show that it sometimes leads to murder. The holder of a policy upon a life in which he has no interest, either of a social or pecuniary nature, has a strong interest in the death of the assured. This interest grows and strengthens with each payment of premium. He has made a bid upon the life of another person. A man who will engage in such a transaction cannot safely be regarded as a saint. He sees with growing impatience that life prolonged from year to year, and his money slipping away in premiums. A man thus situated soon becomes familiar with the thought of the death of the person who stands between him and what, in his morbid fancy, he may regard as his rights. That crime follows, in some instances, is a fact of which we have judicial knowledge."

INSURABLE INTEREST, PARTICULAR INSTANCES

It is said that every individual has an insurable interest in his own life, Northwestern Masonic Aid Association v. Jones, 154 Pa. 99, but it has been suggested further by one writer on insurance that it is more accurate to say the question of insurable interest is immaterial when the policy is upon the insured's own life. Vance, Ins., p. 128. Yet whatever difficulties may be encountered in defining the metes and bounds of insurable interest, the principle is elementary and well settled that a creditor has an insurable interest in the life of his debtor. Scott v. Dickson, 108 Pa. 6.

AMOUNT OF RECOVERY

In both marine and fire policies, in cases of total loss, the amount of recovery depends upon the market value of the property at the time of destruction, except in cases of valued policies, where the value of the subject matter is fixed conclusively at the inception of the risk. In life insurance likewise, the policies are valued conclusively at the inception of the risk. Mainly, it is said, because of the incertitude of valuing human life. There is no limit, as far as the law is concerned, upon the amount of insurance one may take out upon his own life, irrespective of what his earning capacity may be. It further appears that in cases of insurable interest based upon blood, marriage and possibly social relationship, the law has placed no limits to the amount of insurance third persons may carry upon one in whom they are interested, except such apparent disproportion as would obviously be beyond the pale of good faith. At least there are no decisions in mind where the courts have laid down any rule approaching mathematical precision in such cases. However, when we turn our attention to insurance by creditors upon the lives of their debtors, it is discovered that the nature of the interest is but vaguely defined, and in every instance we find the amount of the debt used in various ways to approximate the interest.

What proportion shall the amount of insurance procured bear to the amount of the debt? Upon this question the authorities throughout the various states are by no means harmonious.

RULES SUGGESTED

From the mass of decisions upon this question, three rules in respect thereto may be gleaned, which, for convenience of discussion will be classified as, (1) The Pennsylvania rule announced in Ulrich v. Reinoehl. (2) The Georgia rule laid down in Exchange Bank v. Loh, 104 Ga. 446. (3) The Texas rule suggested in Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338. To these may be added a possible fourth, characterized by its author as "the only working rule," to the effect that when the disproportion between the insurance and the debt is so great, taken with the other circumstances of the case, as to show a want of good faith in the creditor, the policy shall be deemed a wager contract, and void. Vance, Ins., p. 140

ULRICH v. REINOEHL

In 1877, B indebted to the firm of R and M in the sum of $99.51, for which a judgment had been obtained, being desirous for certain reasons of clearing his real estate of this lien, but unable to liquidate the same, proposed to R and M that in consideration of the satisfaction of the judgment he (B) would give them a policy on his life in sum of $3,000. The debt, interest and costs, amounting to $110.02, upon the judgment being satisfied, B obtained a policy in the proposed sum and assigned the same absolutely to R and M, the latter paying the admission charges and all subsequent assessments and premiums. About four years later B died and the proceeds of the policy were paid to R and M, the assignees. U, executor of B, brought assumpsit against the assignees to recover the money. At the trial, under objection, the secretary of the insurance society, testified that B was insured at the age of 42 years; that according to the Carlisle Tables, his expectancy of life was then 26.34 years; that in the event of his living out the expectancy, there would be paid on the policy in premiums, adding interest to the latter, the sum of $4,336.31. Upon verdict and judgment for defendants, the plaintiff appealed, the main question appearing in the assignments of error; (1) to the admission of the evidence objected to, (2) the refusal to charge that the disproportion between the debt and amount of insurance was so great that the transaction was a wager and R and M were entitled to retain only out of the fund sufficient to satisfy the debt, interest and costs, plus the premiums paid with interest, (3) the refusal to charge that the greatest amount retainable by defendants was the principal, etc., of $99.51, with interest for the expectancy of life added to the amount of premiums necessary to insure such aggregate for the expectancy, with interest on the amount of premiums at the lawful rate for one-half for the period, instead of the

disproportionate amount actually taken, and having insured in excess of the sum entitled, defendants are now only entitled to reimbursement. The opinion of the Supreme Court was delivered by Paxson, C. J., who, after observing that the question was not free from difficulty and that the case had been twice argued, affirmed the judgment of the trial court, saying *inter alia:* "We have now reached a point where it is necessary to lay down some fixed rule by which such cases can be disposed of in the future, otherwise the rulings of the courts and the verdicts of juries upon such questions will be arbitrary, and where there is nothing in a case but the amount of the insurance and the amount of the debt, it is impossible for either a court or jury to arrive at a correct result. * * * We are of opinion that a creditor may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt with interest, and the cost of such insurance, with interest thereon during the period of expectancy of life of the assurred, according to the Carlisle Tables. We find no error in the ruling of the court below." At risk of a charge of prolixity, a rather full report of this leading case is submitted to the indulgent reader, in order that the facts, contention of counsel, as well as the meaning and scope of "the fixed rule" may readily be appreciated.

ORIGIN OF THE RULE

In Appeal of Corson, 113 Pa. 438, a creditor, whose claim was subsequently ascertained to have been between $500 and $750, was beneficiary of a policy of $2,000 taken out by the debtor, of which contract Clark, J., observed, "Considering the character of their business relations, the unsettled condition of their affairs, the age of the subject of insurance, the probable amount of premiums which might accrue, the accumulations from interest, we could not say the transaction carries with it any inherent evidences of bad faith. The essential thing is, as stated by the learned judge of the court below, that the policy should be obtained in good faith, and not for purposes of speculation upon the hazard of a life in which the insured has no interest." The rule as finally adopted in Ulrich v. Reinoehl was first actually proposed by Paxson, J., in 1887, in Grants' Admin. v. Kline, 115 Pa. 618, where a creditor holding a claim of $214, was permitted to retain the proceeds of a $3,000 policy; the insured, who was 65 years of age at the time the policy was written, dying within a year after. Says Paxson, J., "We approach this question with caution, the more so that this court has not yet laid down a rule upon this subject. That we shall be compelled some day to do so is possible. * * * Speaking for myself it may be that a policy taken out by a creditor on the life of his debtor, ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of life, as shown by the Carlisle Tables." In the same year, viz, 1887, arose the

case of Cooper v. Shaeffer, 11 Atl. 548, the Supreme Court, approving of the charge of the trial judge that the disproportion between an insurance of $3,000 and a debt of $100 was so great as to compel the court to say as a matter of law, that the policy was a wagering one. In referring to the previous case, Sterrett, J., characterized the rule then foreshadowed as "just and practicable."

STARE DECISIS

The report immediately following that containing Ulrich v. Reinoehl, records a case, Shaffer v. Spangler, 144 Pa. 223, specifically reaffirming the rule of the former case. In sending the cause back for retrial, Paxson, C. J., admonishes thus, "Whether the insurance was so disproportioned to the debt as to make it a speculative or gambling transaction must be determined according to the rule laid down in Ulrich v. Reinoehl, 143 Pa. 238." Again, applying the rule in Wheeland v. Atwood, 192 Pa. 237, the court, through Green, J., reasons as follows: "It was shown by the testimony of the agent of the life insurance company that Mrs. Atwood's expectancy of life at the time the policy was issued, was 25.99 years, and that the amount of premiums that Fessler would have been obliged to pay if she had lived out her expectancy would have been about $4,500. As the policy was for $5,000, Fessler would have been a considerable loser in money if Mrs. Atwood had lived the full period of her expectancy."

EXPOSITION OF FALLACY

Lumpkin, P. J., in Exchange Bank v. Loh, *supra*, comments on the rule as follows. "With the utmost respect we think this is fallacious reasoning. As stated by the distinguished chief justice, 'All life insurance is, in one sense, speculative,' and this remark applies to every policy. It is radically erroneous to say that one average man has a greater or less chance to live out his expectancy than another. The man of forty-two is no more apt to live out his expectancy of 26 years than the man of 75 is to live out his expectancy of 7 years. Life insurance premiums are fixed relatively to the different ages and expectancies of the person insured, and every company whose business is conducted on sound principles proceeds upon the theory that it must be the gainer in every risk when the insured lives out his expectancy and all premiums are paid. Clearly, therefore, in every instance of life insurance, there is a chance for the insured or the person paying the premiums, to pay in more than the policy will bring back, and as a consequence, there can, under the doctrine announced in Pennsylvania, be no such thing as a wagering policy. The test that the amount of the policy taken out to secure a debt must not be out of proportion to the amount of the debt, with added premiums and interest thereon, will not stand scrutiny, for everyone carrying the burden of

keeping up a life policy may, whether a debt be secured or not, suffer loss by paying out more than is finally received on the policy."

FURTHER CRITICISM

In P. & L. Dig. Dec. Vol. 9, *sub nomine* Insurance, 14708, the learned editors have inserted this note: "It is conceived to be impossible to take into consideration, in determining the amount of a creditor's policy, the cost to the creditor of keeping the policy on foot. There can be no such thing as an insurable interest in premiums paid, either the recovery should be limited to the debt and interest or else it should be recognized that a large recovery is in fact a concession to the creditor's desire to gamble on his debtor's life. The attempt to formulate a rule upon the subject, *e.g.*, in Ulrich v. Reinoehl, it is submitted is altogether unsatisfactory."

THE GEORGIA RULE

Justice Lumpkin, who in the quotation, *supra*, with such cogency exposes the fallacy of the rule under discussion, lays down in the same case, Exchange Bank v. Loh, 104 Ga. 446, 44 L. R. A., 372, what we may denominate the Georgia rule, viz: That the insurable interest which a creditor has in the life of his debtor cannot exceed in amount that of the indebtedness to be secured, such indebtedness may, however, include the cost of taking out and keeping up the insurance, if made a charge upon the debtor or his estate, or upon the proceeds of the policy when collected. This rule, it will be observed, is rather similar to the point marked three, submitted by counsel for plaintiff in the Ulrich case, and refused by the trial court. Apropos of any rule, Lumpkin, P. J., remarks. "The truth is, there can be no sound rule on the subject which does not recognize the truth of the proposition that whenever a creditor stipulates for receiving more than indemnity upon a policy insuring his debtor's life he is engaged in a speculative venture, the gain from which, if successful, would be represented by the excess of a sum derived from the policy, over the amount of the "indebtedness" thereby secured."

THE TEXAS RULE

In Equitable Life v. Hazlewood, 75 Tex. 338, 7 L. R. A. 217, Henry, J., suggests a rule in these words: "When the insurance is obtained by a person on his own life, and made payable originally, or by assignment, to another, having none, or only a limited insurable interest in his life, as the surplus after the payment of the charges will go to the party whose life is insured, we see no reason for limiting the amount for which the insurance may be taken out. When the insurance is not contracted for by the person whose life is insured, but by a creditor, in his own name, so that there is no party to the contract ex-

cept himself and the insurer, it becomes immaterial what amount may be contracted for, as no more will be collected than will be ultimately sufficient to discharge his debt and disbursements on the policy, including interest upon both."

CONCLUSION

As is stated elsewhere, the rule in Ulrich v. Reinoehl, is, without cavil, "altogether unsatisfactory." It is not believed our court would adhere to the rule ultimately in its results. It is a deplorable illustration of specious generalization. A word might be added concerning the construction of the phrase "such insurance" in the rule. The casual reader would no doubt infer the reference was to "the debt with interest," but the points refused by the trial court and the affirmation by the Appellate Court, as well as a calculation of the amounts in the principal case and others following, will be convincing that the reference is to the particular sum in question, *e.g.* $3,000. This renders the rule absolutely valueless, for obviously, approximation will be attained in every case no matter what the size of the policy. Again, as insurable interest need only be satisfied at the inception of the risk and not at the time of loss, Appeal of Corson, 113 Pa. 438, according to the rule a ridiculously small debt would be capable of supporting a very large policy, even after the debt had been paid, producing woeful trafficking in human lives. It is submitted that "the good faith" rule of Appeal of Corson, *supra*, is the only practical rule found in our reports, and further that the adoption of the collateral security rule of Texas is extremely desirable, if fundamental reasons for the general doctrine of insurable interest are to be observed.

A. J. W. HUTTON.

MOOT COURT

COMMONWEALTH vs. TOMKINS.

Liquor licenses—Constitutional law—License not a contract—Delegation of legislative power—"Local option" legislation—Art. III, Sec. 7, Constitution of Pennsylvania construed—"Affairs" of counties, etc.

STATEMENT OF THE CASE.

At the January Quarter Sessions, Tomkins was licensed to sell liquor for one year from January first. On April first following, a statute was passed authorizing the people of counties to vote whether there should be licenses or not, and declaring all sales of liquor unlawful in such counties as voted against licenses, existing licenses notwithstanding. The county took the vote in November and voted against license, but Tomkins continued to sell liquor, and for this he is indicted.

McNeal for the Commonwealth.

Jacobs for the defendant.

OPINION OF THE COURT.

RENO, J.:—The statement of the case and the able arguments of the learned counsel present for our consideration several interesting and important questions. Among them may be mentioned the following: (a) Can an indictment be sustained when based upon a statute which defines an offense but which does not prescribe a penalty for its violation? (b) Is this local option act such a delegation of the legislative power as would warrant a court in denouncing it as unconstitutional? (c) Are any of the defendant's constitutional rights infringed by subjecting him to a punishment imposed by an act passed subsequent to a grant of a license? Each of these is so vital to a decision, that a determination of any one of them in favor of the defendant would result in quashing the indictment. However, our view of the case, as will be shown hereafter, makes it unnecessary for us to definitely adjudicate any of the aforementioned propositions. Nevertheless, we are free to confess, that our opinion founded on an examination of the following authorities, would be in favor of sustaining the indictment on every point raised: Act of March 31, 1860, P. L. 382, sec. 178; Locke's Appeal, 72 Pa. 491; O'Neill v. Ins. Co., 166 Pa. 72; Bartemyer v. Iowa, 18 Wall. 85; Calder v. Kurby, 5 Gray 597.

Our view of the case, adopted after a diligent search of the authorities, constrains us to grant the motion to quash. While we are unable to cite any perfectly analogous cases, we are, nevertheless, convinced that the legislation here attempted was abortive, being a violation of Art. III, Sec. 7, of the Constitution of Pennsylvania. That section is as follows: "The General Assembly shall not pass any local or special law . . . . regulating the affairs of counties, cities, townships, wards, boroughs, or school districts, ... nor shall the General Assembly indirectly enact such special or local law by the repeal of a general law." This provision is not found in the previous constitution of 1838 or any of the amendments thereto, and we may rightly infer that it was enacted with a view to remedy a condition deemed injurious to the welfare of the people. Certainly it is not a gratifying spectacle that one great people living within the confines of one state should be governed by laws as unlike in nature as the political sub-divisions are in number. Laws should be uniform, so that they may be just; and if a rule of uniformity requires anything it surely in-

sists that people living under like conditions should be subject to similar laws, or to the same laws. Long ago eminent publicists denounced class legislation —the genius of our institutions condemns it; and the step from class to local legislation is not so great that one can be sanctioned and the other renounced with consistency. Why one portion of a state should enjoy a privilege or undergo a restraint not enjoyed or suffered by another portion, when the conditions in each are essentially similar, is, to say the least, difficult to comprehend. Surely the state is not disposed to favor one more than the other, and in a properly governed state no community could have any claim upon the beneficence of the legislative power not enjoyed by every like community. We believe that these were some of the evils the provision in our present constitution was designed to remedy, and we would be recreant to duty if we did not discountenance every attempt to evade it. Every law enacted upon any of the subjects prohibited by this section is void if it be local or special.

What then is a local law? Paxton, J., has defined a local or special law as "one which operates or may operate within only a portion of the territory occupied by the person or things to which the legislation naturally and properly relates." Frost v. Cherry, 122 Pa. 417.

Is this act local? The act authorized the people of the different counties to vote whether there should be licenses or not, and declared all sales of liquor unlawful in such counties as voted against licenses. In other words, it gave the people of the respective counties an opportunity to say whether or not that county, *i. e.*, the county wherein they voted, should have licensed drinking places. Waiving for a moment consideration of the principle denying a delegation of legislative power, it is patent that if some of the counties vote in favor of licenses and some against, the very condition the constitution seeks to avoid will result. The law will not be uniform; some counties will be governed by a code inoperative in others; the very evil sought to be eradicated will again arise. Nor can it be argued that there is a possibility that all the counties will vote the same way, and that therefore the law would be general, since it has been said that the test is results, not possibilities. Frost v. Cherry, *supra*. If legislation like this were sustained it would be comparatively easy for any county, city or borough to secure whatever particular law it might desire without interfering with the legislation of other counties, cities or boroughs, by simply tacking on a provision that it should be operative only in such counties, etc., which voted for it. The courts have not hesitated to denounce such legislation. Commonwealth v. Denworth, 145 Pa. 173; Appeal of the City of Scranton School District, 113 Pa. 188; Aspar's Appeal, 122 Pa. 266; Frost v. Cherry, *supra*; *Cf.* Reading v. Savage, 124 Pa. 328.

The constitution speaks of "regulating the affairs of counties," etc. We are satisfied that both reason and authority dictate that an attempt to legislate with reference to the subject of licenses to sell liquor is a regulation of the affairs of a county. If that clause were limited in its operation only to the ordinary governmental or administrative affairs of a county or city, the range of subjects upon which the General Assembly may not legislate by local or special acts would be comparatively narrow. There does not seem to be any disposition to limit its operation to that class of subjects. When the constitution speaks of the affairs of the county it means such as affect the people of that county. Morrison v. Bachert, 112 Pa. 322. Saving that of taxation we know of no subject upon which the legislature is competent to pass which affects the people of a county so vitally as does the sale of liquors. Whether liquor is to be sold at all, and if so, whether under license granted by the law or not, are questions in which the people always will manifest a decided interest, because their welfare depends on how the sale and consumption of intoxicants is regulated.

In Frost v. Cherry, *supra*, a statute was held unconstitutional as local legislation because it gave the people of the respective counties an opportunity to say whether or not the fence law of 1770 should be repealed, and provided for its repeal in those counties where the electorate should so decree. The case expressly holds that the act affected the great body of the people of the county; that as such it was a "regulation of the *affairs* of the county," and approved the definition of that phrase as laid down in Morrison v. Bachert, *supra*. If a fence law and its repeal is one which affects the people of a county, it does not require much argument to convince the average man that the repeal of the Brooks liquor license law of 1887 is one of the same class. The effect of the one is to our mind infinitely greater upon the welfare of the people than the other.

Nor will the fact that the people were given an opportunity to say whether this act should operate upon themselves, save this piece of legislation. We do not believe that Locke's Appeal, *supra*, has ceased to be law by reason of the adoption of the present constitution. Within the limitations laid down in that case, the legislature may still delegate to the people the power to legislate, but the General Assembly cannot do indirectly what it could not have done directly. Directly, it cannot pass a local act; can it by a species of *referendum* arrogate to itself that power? We believe not. If the law making power wishes to submit an act treating of one of the prohibited subjects within Art. III, Sec. 7, of the Constitution, to the verdict of the people as to whether it is to go into operation or not, the question must be, "Shall it go into effect throughout the state?" The vote of the people of the state must be taken to ascertain whether it is to be law for the whole state, and not whether it shall be law for those portions that desire it.

The question of classification is not involved in this case, and hence the doctrine of Wheeler v. Philadelphia, 77 Pa. 346, need not be considered.

On the whole we have concluded that the act is unconstitutional and void, and that therefore an indictment based upon it must be quashed. In addition to the reasons advanced above, we are persuaded by decisions in many other states having similar provisions in their organic law, and by the fact that no local option act, so called, has passed the General Assembly since 1874, that our decision is correct. *Vide* 19 Am. & Eng. Ency. of Law 493. The decision in McGonnell's License, 24 Super. Ct. 642, does not interfere with our conclusion. There the repeal of an existing local law by vote of the people was held unconstitutional because of an unwarranted delegation of legislative authority. Besides, the constitution makes provision for the repeal of a local or general law, and, possibly, if the method of submission be within Locke's Appeal, *supra*, will be sustained.

Motion to quash granted.

OPINION OF THE SUPREME COURT.

The defendant was indicted for selling liquor. He had received a license for one year, but in the midst of the year the voters of the county had, under a so-called "local option" law, voted against licenses. The law enacted that when they should do so, it should thenceforth be unlawful to sell liquor in the county.

A license is not a contract between the state and the licensee. Commonwealth v. Sellers, 130 Pa. 32; Commonwealth v. Jones, 10 Pa. C. C. 611. The state may, pending the term of the license, take away some, (Commonwealth v. Donohue, 149 Pa. 104; 10 Pa. C. C. 611, *supra*), or all, of the privileges conferred by it, (Cooley, Constit. Lim., 7th edit., 400,) for the police power is inalienable by contract or otherwise.

An objection sometimes made to so called "local option" laws is that they are essentially an unconstitutional delegation of legislative power. Such is the

view taken by the courts of some states. Such was the view once taken by the Supreme Court of Pennsylvania. Parker v. Commonwealth, 6 Pa. 507; *Cf.* Cooley, Constit. Lim., 173. It has since been held that the suspension of the application of a statute upon the ascertainment of a fact by a body external to the legislature, does not impart to this body legislative power. And this was said of a statute which did not suspend its own operation on the ascertainment of a fact, by such exterior body, but upon the *will* of that body. Locke's Appeal, 72 Pa. 491; O'Neil v. Artisan's Insurance Co., 166 Pa. 72; McGonnell's License, 209 Pa. 327. A law which forbade the issue of licenses to sell liquor in localities, the people of which expressed, by ballot, their will that there should be none, was held not a delegation of legislative power. Such must be the decision of the question, should it again present itself for adjudication.

The essence of such a law is, that the legislature expresses its will, not absolutely but conditionally. It wills that there shall be licenses if the people vote for them, and that there shall be none if the people vote against them. It makes the will of the locality its will, and it does this in advance of the expression of the locality's will.

There is a well known method by which, in substance, this species of legislation is habitually employed. Instead of submitting distinct and separate questions to a locality, a large class of questions might be submitted at once. Instead of allowing a vote at some single time, or at times recurring at considerable intervals, the expression of the local will might be made possible frequently and at short intervals. The will might be expressed directly by the electors, or a select body, elected by them, might be the organ of the people of a locality, for the manifestation of their will. The device for securing regulations and laws specially adapted to localities, has been to create them into so-called cities or boroughs, to allow these cities or boroughs to elect, from time to time, deliberative bodies called councils; to permit these councils to enact rules and regulations on a vast variety of subjects, and to impart to such rules and regulations the force of law.

The legislature might, if it chose, do all the legislation for every borough, *i. e.*, might determine the content of a local law and also put behind it the will which makes it law. It may also allow the city or borough council to determine the content of a regulation and impart the central legislative will to it, thus turning it into law. It might allow a council to pass ordinances, and then, on their being reported to it, enact them. But this is not the ordinary way of giving the force of law to such ordinances. The legislature may, and does, in advance of the particular ordainings, enact whatever ordainings shall occur, on certain subjects, within certain limits, into law. When the legislature does this, it is sometimes said to delegate to cities and towns the law-making power. It does delegate this power, in this case, precisely as it delegates it in the case of a submission to a local vote of a definite regulation, accompanied with an enactment of that regulation, if locally approved, into law.

We have intimated that if the legislature can give this power of voicing the local will to a council chosen by the electors, it could give it to the electors themselves. If it can give power to voice the local will concerning an undefined mass of subjects to the locality, it can give this power concerning one determinate subject. If it can create cities or boroughs, in order to give them this power, it can give this power to townships or counties. The latter are rudimentary municipal corporations. Their organs, competences and powers may be made more or less numerous, according to the legislative desire. At bottom, then, the question before us is, can the legislature, by a general law, enact in the localities as law what these localities, by the legislatively-created organ, will to be law? The constitution does not impose any particular organ-

ization for borough, city, township or county. It can be made more or less complex. A so-called legislative power can as well be imparted to a township or county as to a borough or city.

It may be that there are some topics with respect to which the constitution refuses to the legislature the power of permitting local will to bring certain regulations into operation. An examination of existing legislation, however, shows that the topics concerning which the local will habitally expresses itself with general acquiescence in the constitutionality of the delegation, are numerous and important. When it is better to have uniform rules in all cities, it would be better for the legislature to enact them. When, on a given subject, one regulation might suit city A and a different one city B and another city C, it might be better to depute to the cities, severally, the enactment of their regulations. In actual practice, one borough may have police, and another not; one may pension its policemen, and another not; one may prohibit dangerous occupations, and another not; one may regulate party-walls, and another not; one may restrain the running at large of horses, cattle, sheep, etc., and another not; one may regulate peddling, hawking, etc., and another not; one may prohibit plays, shows, etc., and another not. Would there be any shock to principle if boroughs were permitted either to prevent or to tolerate sales of liquor, as they severally chose?

One city may have regulations concerning obstructions on sidewalks or porches, or police, or hospitals, or shows, and another none or different. One may offer rewards for the arrest of criminals, a topic which in a sense concerns the whole state, and another not; regulate bathing in public streams, suppress houses of prostitution, gambling, Sabbath desecration, while another does not. One may adopt regulations for the general health and for the removal of nuisances, for precautions against the spread of contagious diseases, for partition fences, and another not. Would it alarm one to hear that, added to the subjects about which the local will was made dominant, was the subject of repressing intemperance? Is the propagation of physical disease a fit theme for local volition, and that of mental or moral disease not?

It is true that the effect of so-called local legislation is that one kind of rule of action is by it made to exist at one spot and another kind at another spot. One borough may forbid wooden buildings, and others allow them; or the same borough may forbid them in one part of it and allow them in another part of it. This production of variety of regulation in the different parts of the state called boroughs or cities, is, we are assured, not inconsistent with the constitution. It forbids the General Assembly to pass local or special acts, but not a general act giving effect to the various wills of the municipalities. Klingler v. Bickel, 117 Pa. 326. The law, as it leaves the legislature, is general, equally applicable to every borough or every city. It, practically, enacts every ordinance that any of them may from time to time make within certain limits. The localness of the rule is not the quality of the General Assembly's law, but of the local will acting under that law.

We think it undeniable that regulation of many topics can be constitutionally remitted by the assembly to localities; that it can do this by the creation of a permanent so-called local legislature, or by the creation of a legislature *ad hoc;* that the local legislative body may be composed of persons selected from the electors, or of the whole number of electors; that there is no constitutional restraint on creating in counties or townships, this local legislature, whether permanent or momentary, select or universal; and that the range of subjects which can be put within the competence of the local will is indefinitely vast and does not exclude the selling of liquors.

The obstacle which is cited, to the remission to the localities of the deci-

sion whether liquors shall be sold in them, *i. e.*, to the enactment of a local option law, is the 7th section of Art. III of the Constitution of 1874, which ordains that "The General Assembly shall not pass any local or special law . . regulating the affairs of counties, cities, townships, wards, boroughs or school districts."

It might be enough to repeat that under this very section the habit of endowing local wills with legislative power, has flourished. It is therefore recognized, as a principle, that when the General Assembly, by a general law, confers on the ordinances of cities and boroughs the force of law, the law does not become local and special in the constitutional sense, by reason of the possibility that, through the diverse action of the localities, the rule of action will vary in the several localities.

The principle, however, was laid down in Frost v. Cherry, 122 Pa. 417, City of Scranton School District's Appeal, 113 Pa. 176, that when the operation of a rule of action is made to depend at separate places, on local wills, the possibility that these wills will be different makes the general law under which these wills are to speak, and from which they get their legislative efficacy, special and local. The logical application of that principle would condemn all local municipal legislation. In Frost v. Cherry, 122 Pa. 417, it condemned the law which gave local county wills the power to determine whether it should be obligatory or not for land owners to build fences. As the ordinances of cities and boroughs deal with *affairs* of cities and boroughs, there is always the possibility of the production of one rule in one city and another in another, under a general law giving power to the local will. Nay this variety is intended to be made possible. A variety of legislation as to *affairs* of cities and boroughs is therefore not prohibited, nor is a general law forbidden under which this various legislation may spring up. The difference between the legislation in Frost v. Cherry and ordinary municipal legislation was, that in that case the municipality was the slightly organized county without a separate legislative organ, whereas the city or borough has such an organ, which operates not occasionally and by special and particular legislative delegation, but regularly, permanently, and under a general delegation; a difference absolutely irrelevant.

Even if we could concede that the constitution prohibits general legislation giving effect to possibly variant local wills, it would be necessary to inquire whether the sale of liquor is one of the topics concerning which local and special legislation is forbidden. The 7th section of Art. III prohibits local or special laws "regulating the affairs of counties, cities, townships, wards, boroughs or school districts." It would be necessary to discover that a law about liquor selling is a law about an affair of a county.

The phrase "affairs of counties" is, at first sight, seen to be exceedingly vague. In Morrison v. Bachert, 112 Pa. 322, the word "affairs" is self-evidently said to be one of "broad signification." It is added, "that the convention used it understandingly," but, as the convention did not enact the constitution, but the people who voted for it, it would be more useful for us to be assured that *they* used it understandingly, and what that understanding was. The same opinion adds that "when it [the constitution] speaks of the affairs of a county, it means such affairs as affect the people of the county." It is hardly necessary to suggest that this is a definition which does not define. What affair does not affect the people, that is, some of the people, of a county? The state is composed of counties. Every square foot of it lies in some county. All its people are in some county. If an affair affecting the people of a county is an affair of a county, every imaginable law is a law regulating such an affair. Every county has fences. Therefore fences are a county affair. Frost v. Cherry, 122 Pa. 417. Every county has houses; laws regulating them are laws regu-

lating county affairs. Every county has men, women, children in it. All contracts and torts are made in some county. All crimes are committed in some county. All roads, bridges, courts, cemeteries, liens, are in some county. If laws regulating all of these things are laws regulating the affairs of counties, why was the 7th section of Art. III expanded over a page and a half, when it would have sufficed to use the first three lines?

We shall not attempt to define the expression "affairs of counties." We think it enough to say that sales of whiskey, beer or wine, are no more the affairs of counties than the sales of shoes, coats and hams.

In Commonwealth v. Hospital, 198 Pa. 270, it is held that the prevention of the spread of infectious and contagious diseases is not an affair of counties, for an act on that topic, limited to cities, was upheld. Surely, if an act to prevent the diffusion of physical contagion is not an affair of counties, neither is one to prevent the spread of the contagion of intemperance.

In far the greater number of cases in which the question has been considered, "affairs of counties," etc., has been understood to refer to operations of the municipality, its officers, their salaries, their duties, taxation, the indexing of records, etc. Morrison v. Bachert (fees), 112 Pa. 322; 3 P. & L. Dig. Decisions, col. 3623. Many of the decisions condemning legislation as local or special, proceeded on the ground not that they dealt with the affairs of counties, but with other matters, *e g.*, prescribing the duties of officers, regulating practice, Commonwealth v. Carey, 2 Pa. C. C. 293; regulating corporations, Weinman v. Wilkinsburg, etc., Railway Co., 118 Pa. 192; authorizing liens, Davis v. Clark, 106 Pa. 377. Frost v. Cherry, has few congeners.

Is it suggested that while sales of whiskey are not affairs of counties, the licensing of sales is? The licensing of sales is not done by counties or by county officers. The judicial function is not a county function, and the judges are not county officers. Nor, as administrative officers, are they other than state officers. The regulation of sales of liquor is not, under our system, the usual business of a county. The state might, for this purpose, be divided into districts, each composed of several counties, and a licensing board for each district might be created.

The real question before us is the far-reaching and fundamental one: Can the legislature give effect to the wills of local bodies? For if it can, the mode in which this is done is unimportant. It may be done, as we have suggested, by the creation of permanent councils, which shall evolve regulations from time to time, or by the submission of special proposals to the electors, conditioned to go into effect upon their consent. Any decision that denies this power subverts the system of government under which we have subsisted for more than two centuries.

A subordinate question is, if the legislature can condition any regulations upon local approval, can it condition the prohibition of sales of intoxicants upon local approval? That it is not irrational to consult the wishes of the locality in determining whether sales of liquors shall be allowed, is evidenced by many local option statutes still operative in this state; by the experiments made in local option in so many other states and countries. The variations, from place to place, of the character, habits, tendencies and morals of the people, make it eminently fit that the opinions and wishes of the localities should have effect, regarding liquor sales, as regarding the hundred other subjects committed in municipal legislation to their control.

We conclude that the legislature can, by general law, enact that the will of boroughs, cities, townships, counties, shall control the sale of liquors, and that this will may express itself through permanent bodies, like councils, or by a special vote of the electors.

It follows that the learned court below improperly quashed the indictment.

Judgment reversed with *procedendo*.

GLASCOCK vs. TEMP.

Contract of bailment—Lien—Livery stable keeper's right to assign claim together with property as security—Replevin—Acts of April 7, 1807; Dec. 14, 1863.

STATEMENT OF THE CASE.

Glynn, a livery stable keeper, having a lien on a horse for board, assigned the claim, together with the horse, as security therefor, to the defendant, Temp. Glascock, the owner of the horse, brings replevin.

Setzer for the plaintiff.

When a bailee voluntarily surrenders the property to which the lien attaches the lien ceases. Rodgers v. Grothe, 58 Pa. 414; McFarland v. Wheeler, 26 Wend. 467; Doam v. Russell, 3 Gray 382.

Carey for the defendant.

Act of Dec. 14th, 1863, 2 P. & L. Dig. 3985, changes the common law rule and gives the bailee the right to sell. Rodgers v. Grothe, 58 Pa. 414.

OPINION OF THE COURT.

SIPES, J.:—Glynn, a livery stable keeper, having a lien on a horse for board, assigned the claim, together with the horse as security therefor, to the defendant, Temp. Glascock, the owner of the horse, brings replevin.

The Act of April 7, 1807, 2 P. & L. Dig. 3714, gives livery stable keepers the right to sell horses for their board. The act prescribes the manner of sale and the conditions under which a sale may be had, but Gynn did not follow the provisions of this act, nor of the Act of 1863, which provides that in all cases in which commission merchants, factors and all common carriers, or other persons, shall have a lien upon any goods, or other property, for or on account of the costs or expenses sustained on such goods or other property, if the owner fail to pay the amount of charges upon such goods or property within 60 days after demand, it shall be lawful for the one having such lien to expose such property to sale at public auction.

It is true that these Acts of Assembly do not give the bailee the right to transfer his lien, but nevertheless the courts recognize this right in Rodgers v. Grothe, 58 Pa. 414. A transfer of the charge upon the property, together with its possession, effects a substitution of the purchaser to the right of the bailee to receive the money and to retain the property as security; when the sale has been made in good faith, the purchaser has same right to proceed to demand and enforce payment after notice as the bailee had. The rights of the owner remain unchanged. He is bound only for the charge as it existed in the bailee, and he can demand and receive his property on same terms as from the bailee.

It is the opinion of the court that the case at bar is governed by the doctrine thus laid down in Rodgers v. Grothe, *supra*, and accordingly judgment must be for the defendant.

OPINION OF THE SUPREME COURT.

The Act of April 7th, 1807, 2 P. & L. Dig. 3714, enacts that "all livery stable keepers . . . shall have a lien upon any and every horse . . . for the expense of the keeping." In case this expense, amounting to $30, shall not be paid within 15 days after demand, the livery stable keeper is authorized to

sell the horse at public sale, and to deduct the expense and the costs of sale, paying the residue of the purchase money to the owner.

But for some statutory provision for sale, Glynn would have no right to transfer the horse. He would, by selling it, at once have forfeited his right of lien, and it could not have been claimed by Temp. Rodgers v. Grothe, 58 Pa. 414; Ruggles v. Walker, 34 Vt. 468; Glascock v. Temp, 59 N. E. 342 (Ind.); Bradley v. Spofford, 23 N. H. 444; Daubiquy v. Duval, 5 Term R. 604; McFarland v. Wheeler, 26 Wend. 467; Doane v. Russell, 3 Gray 382.

It is said, however, in Rodgers v. Grothe, 58 Pa. 414, that a statutory power of sale, given to the bailee, so far changes the incidents of the bailment as to authorize the bailee to sell his claim to compensation to another, and to impart to the vendee the same lien that he had.

The Act of April 7th, 1807, authorizes the sale only when the money due is at least $30. As it does not appear that Glynn's claim was for as much, it of course does not appear that he had the right of sale.

The Act of Dec. 14th, 1863, 2 P. & L. Dig. 3985, gives a power of sale to "commission merchants, factors, and all common carriers and other persons" having liens, for the expenses of "carriage, storage or labor bestowed" on "goods, wares, merchandise or other property." The lien in the case before us is "for board." It might be doubted whether this act contemplated a livery stable keeper. He is not a merchant, factor or common carrier, though he is "another person." Yet Rodgers v. Grothe, 58 Pa. 414, assumes that it does. In that case the charges were for attempting to cure a horse, and probably for its keep and the cost of medicine, The latter charges are not strictly charges for carriage, storage or labor bestowed. It is likely, however, that a liberal interpretation should be put on the act. There is no apparent reason for allowing a sale, in order to realize such charge, while refusing it, when the purpose is to realize the charge for keep. The keep may be deemed incidental to the "storage" of a livery animal, as to the "labor" of furnishing it, from time to time to it. We approve, therefore, of the decision reached by the learned court below.

Judgment affirmed.

COMMONWEALTH vs. BABCOCK.

Liquor license—Wholesale—Right of wholesale liquor licensee to bottle beer.

STATEMENT OF THE CASE.

Babcock obtained a license for the purpose of wholesaling liquor for which he paid $200. A few months afterwards he begins the business of bottling beer, claiming that he has that privilege under his license. This is a criminal prosecution for violating the liquor law.

Park for the Commonwealth.

Rauffenbart for the defendant.

Wholesaler may bottle beer. Kiehel's License, 15 Lanc. L. R 31; Johnson's License, 7 D. R. 248.

OPINION OF THE COURT.

BOWMAN, J. :—It is contended on the part of the Commonwealth, (1) That section two of the Act of July 30, 1897, P. L. 464, which provides that persons, residents of boroughs, licensed to sell vinous, spirituous, malt, and brewed liquors, or any admixture thereof, by retail, shall pay annually

an additional license tax of fifty dollars, applies to bottlers, and that the defendant, having paid two hundred dollars for a wholesale license, and not the additional license tax of fifty dollars, should be found guilty of violation of the liquor law; (2) That it was not in contemplation of those who framed the act that bottlers, who deal in but one line of goods, to wit: malt and brewed liquors, shall be required to pay a license fee and tax of two hundred and fifty dollars, while those who deal in all kinds of liquors, to wit: vinous, spirituous, malt and brewed, shall be required to pay only two hundred dollars, and that such a construction of the act is an absurdity; (3) That the correct construction of the act is that wholesalers shall pay a fee of two hundred dollars, and all those who bottle beer shall pay two hundred and fifty dollars, and defendant, having paid but two hundred dollars, is guilty.

Babcock obtained his license under the Act of 1897, to deal in intoxicating liquors, either vinous, spirituous, malt or brewed, and paid two hundred dollars therefor. Under this act he is permitted to deal in any of the kinds mentioned. We have no difficulty in arriving at the conclusion that Babcock has a right to sell malt and brewed liquors. The question arises, is he subject to the additional tax of fifty dollars, under section two of the act, in order that he may bottle beer? This section seems to apply to retailers only. It is so stated specifically in the act. We cannot see that this section applies to the present case in any respect. Babcock is not a retail dealer, and, therefore, is not violating the act by not paying the additional tax. We are more fully convinced as to this after reading the opinion of Hon. Amos H. Mylin, some time Auditor General of the State of Pennsylvania, who, in construing the Act of 1897, says: "The license fees provided in the first section of the Act of July 30, 1897, are entirely independent of the fees provided in the second section of the act. Under the second section of the act the additional fee applies only to such persons as sell by retail. It should be added to the license fee provided by pre-existing laws for retailers, and the section has no other purpose. Bottlers and storekeepers are contra-distinguished from retailers under this act." 1 Dauphin County Reporter, 4.

If Babcock has the right to sell malt and brewed liquors, has he not the right to place same in such condition that they can be sold? He may sell in quantities not less than twelve pints. Is he guilty of a greater violation of the law in bottling twelve pints of beer than he would be in buying twelve pint bottles of beer and selling them again?

It does seem unreasonable that a wholesaler of vinous, spirituous, malt and brewed liquors is required to pay only two hundred dollars, while a bottler who deals only in malt and brewed liquors is required to pay fifty dollars more, or two hundred and fifty dollars. It may even seem absurd, as the attorney for the Commonwealth suggests. But who will assert that no absurdities exist in the statutes of Pennsylvania?

Our construction of the Act of July 30, 1897, P. L. 464, is that under section one, wholesalers, having license to sell vinous, spirituous, malt and brewed liquors, may also bottle any of the kinds mentioned; and that section two, which provides for an additional license tax of fifty dollars, applies only to retailers.

This conclusion has been reached by Livingston, J., in License of Kiehl & Kieffer, 15 Lanc. L. R. 311.

We are convinced that the legislature over-looked the inconsistency of the Act of 1897, but we are constrained to construe the act strictly, and not for the sake of reasonableness find the defendant guilty, particularly in the absence of any precedents from the appellate courts of Pennsylvania.

Judgment for defendant.

OPINION OF THE SUPERIOR COURT.

The 2d section of the act of June 9th, 1891, enacts that it shall not be lawful for any rectifier, etc., "nor any wholesale dealer or store-keeper to sell any spirituous or vinous liquors in less quantities than one quart, and brewed or malt liquors in less quantities than 12 pint bottles, nor shall any brewer or bottler sell less than 12 pint bottles of brewed or malt liquors."

It is evident that the wholesaler may sell brewed or malt liquors, and that he may sell them in bottles. But can he put these liquors into bottles, and then sell them in the bottles?

The acts of assembly distinguish between a bottler, a wholesaler and a retailer. To bottle is "to put into a bottle or bottles." A bottler is "one whose trade is to bottle wine, beer, mineral waters, etc." Standard Dict. *ad verbum.* If we modify this into "one whose trade is to buy malt and brewed liquors in casks, kegs, barrels, etc., and to bottle them, and to sell them in bottles," we shall probably have the definition of the term "bottler" as understood in the statutes of Pennsylvania. The bottler is one whose business is to put into bottles for the purpose of sale. Can then the "bottler" lawfully sell unbottled beer? McPherson and Simonton, J. J., have held that he can sell beer in the keg. *In re* Application of Johnson, 1 Dauphin 40. Yet with respect to that keg, he is not a bottler. They probably reasoned, that if he had the power to transfer the contents of the keg into bottles and sell these, he ought to have the power to sell the contents of the keg without this transfer.

The wholesaler buys in casks, barrels, kegs. He can sell in these or in less quantities. He must not descend below a quart of spirituous or vinous liquors, nor below 12 pint bottles of brewed or malt liquors. Can he put the spirituous liquor into his own bottles and sell them? Or must he insist that the customer bring his own bottle, (or other vessel,) and, at the time of the sale, pour the liquor into the customer's bottle? On the other hand, can he sell the brewed or malt liquors otherwise than in bottles? So Waddell, J., thinks. Commonwealth v. Watson, 2 Dist. 526. Yet, if the legislature intended to prescribe a minimum quantity only, it is not easy to see why it did not say 12 pints, or one gallon and a half, instead of twelve pint bottles.

Does the legislature intend that the wholesaler may do his own bottling? If he may, wherein will he differ, as far as his dealings in malt and brewed liquor are concerned, from a bottler? The bottler buys in large quantity; so does the wholesaler. The bottler sells not less than twelve pint bottles; so does the wholesaler. The bottler transfers from barrel to bottles, with a view to sale; so, by supposition, does the wholesaler. The only difference between them would be, that while the bottler deals only in malt and brewed liquor, the wholesaler deals, or may deal, also in spirits and wines. If this is the intended difference between them, it is impossible to understand why the business of wider scope, that of the wholesaler, pays in boroughs, only $200 per year for the license, Sect. 1, Act July 30th. 1897; 3 P. & L. Dig. Stat. 372, while that of narrower scope, the bottler's, pays $250.

The suggested criterion that the permissible bottling of the wholesaler is only incidental, is unsatisfactory. The bottling of the bottler is only incidental to sale. The liquor in bulk is distributed into bottles for facility of sale, carriage and consumption. If the wholesaler bottles he does it for the same purpose. If he has the power to bottle for this purpose, who shall prescribe a limit to the extent of its exercise? The only limit need be, the extent of his custom. If, finding purchasers of 500 bottles a year, he can bottle for them, so, finding purchasers for 500,000 bottles he could bottle for them. If he has customers for twice as much brewed and malt liquor, as whiskey, brandy or wine, he can supply them; and if there are buyers of 999 times more of the former

than of the latter, he can still supply them, and he can supply them in bottles. It is easy to discern that the distinction between the bottler's and the wholesaler's business would become merely verbal. Everything that the bottler can do could be done under the wholesaler's license.

We think the legislature must have intended to allow the wholesaler to sell malt or brewed liquor only in the vessels in which he purchased them, or in vessels furnished by the customer. He can buy *bottled* beer, or ale, etc., by the wholesale, but he cannot buy it by the cask, and transfer it into bottles not furnished by the customer, for the purpose of sale. To do that would be to do the characteristic act of a "bottler," and a "bottler's" license would be a prerequisite.

In License of Kiehl, 15 Lanc. 311, it is held that a wholesaler can *bottle* and sell beer, by the wholesale, but reasons are altogether wanting. We decline to follow it.

The opinion in Johnson's Application *supra*, that a bottler may sell beer by the keg, *i. e.* without doing his characteristic act of bottling, is hardly an authority that the wholesaler can *do* the bottler's characteristic act, and bottle for the purpose of selling.

There may be no sufficient reason, were classifications of businesses to be now made at one stroke, for distinguishing them by the practice of bottling for sale, and the practice of selling without bottling. The law does not creat businesses, but recognizes them when created. The business of selling wholesale, without previous bottling by the seller, has been long and widely pure sued; as has also the different business of bottling for the purpose of sale and and selling. The legislature did not make these businesses, but noticed them and licensed them. It is not for a licensee for one, on discovering that the two businesses could be conveniently and economically combined, to insist that his license for one, is a license for two businesses.

It does not follow from anything that we have said, that the wholesaler cannot "bottle" whiskey or wine. The "bottler's" business, defined by business and statutory usage, is not that of bottling and selling spirituous or vinous liquors. *In re* Peak's License, 2 S. Phila. In bottling and selling them, therefore, the wholesaler is not doing the act which is characteristic of the "bottler's" business.

Judgment reversed.

BARRET v. FAULKNER

Wills—Interpretation— Trust for sole and separate use—Active trustees—Rule in Shelly's case.

STATEMENT OF THE CASE.

Eliza Barrett, mother of Sarah, devised a farm to her son John "in trust, to pay the net rents to Sarah during her life, for her sole and separate use, and, at her death to convey it to her children, or the issue of such children as shall be dead, such issue taking only what their parent would have taken if alive; but if she shall die without issue, then to convey it to himself in fee." Sarah was, and still is, unmarried. Claiming a fee, however, she has contracted to sell the land in fee to Faulkner, who declines the deed, on the ground that Sarah cannot give a good title in fee. Assumpsit for purchase money.

Robertson for the plaintiff.

Plaintiff takes a fee. Yarnall's Appeal, 70 Pa. 335; when the purpose of a trust fails, a devisee for life takes a fee.

Washington for the defendant.

Trusts fail where *cestui que* trust was neither married nor in contemplation of marriage, unless active duties are imposed. Ogden's Appeal, 70 Pa. 507. Active duties are here imposed. Kuntzleman's Appeal, 136 Pa. 151. William's Appeal, 83 Pa. 377.

OPINION OF THE COURT.

LABAR, J. :—This is an action of assumpsit for the purchase money of a farm which plaintiff contracted to sell in fee to Faulkner, who declines to accept the deed on the ground that she cannot give a good title in fee. Plaintiff derived her title by devise from her mother, Eliza Barrett.

By the will of Eliza Barrett, she devised the farm to her son, John, in trust to "pay the net rents to Sarah during her life, for her sole and separate use, and at her death to convey it to her children, or the issue of such children as should then be dead, such issue taking only what their parents would have taken if alive, but if she shall die without issue then to convey it to himself in fee."

The interest of Sarah Barrett in the premises depends upon the interpretation of the will of Eliza Barrett, deceased.

The object of all interpretation of wills is to ascertain the intention of the testator.—Tiedeman on Real Property, p. 884.

The intention of the testator must be gathered from the will itself. Miller's Appeal, 113 Pa. 459 ; Baker's Appeal, 115 Pa. 591.

The words of the will does create a separate use trust. A trust merely for coverture will fall if there is no marriage in fact or in contemplation to support it, or if the *cestui que trust* becomes discovert by the death of her husband, and the circumstance that the trust imposes active duties upon the trustee will not prevent that result ; Megargee vs. Naglee, 64 Pa. 216 ; Kuntzleman's Estate, 136 Pa. 142 ; Yarnall's Appeal, 70 Pa. 336 ; Ogden's Appeal, 70 Pa. 501. Quin's Estate, 144 Pa. 444.

It does not appear by the facts in this case that Sarah Barrett was even in contemplation of marriage at the time the devise was made. But an examination of the entire clause of the will shows that the separate use trust was not the main or controlling feature of the trust. Where an active trust is created to give effect to a well defined lawful purpose of a testator in relation to his family, the trust will be sustained, whether the *cestui que trust* be *sui juris* or not. Bispham on Equity (6th edition) pp. 84-87 ; Barnett's Appeal, 46 Pa. 392; Earp's Appeal, 25 Pa. 119; William's Appeal, 83 Pa. 377 ; Phillip's Appeal, 80 Pa. 472; Sivezly's Appeal, 106 Pa. 201.

A trust to pay the net income of realty to the *cestui que trust* involves the exercise of discretion by the trustee and constitutes an active and continuing trust. Wolfinger v. Fell 195 Pa. 12 ; Hemphill's Estate, 180 Pa. 95.

If the beneficiary of a trust be a woman the benefactor can protect her from her own debts and improvidence as well as from those of her husband. Ashhurst's Appeal, 77 Pa. 464; Ash's Appeal, 80 Pa. 497 ; Seitzinger's Estate, 170 Pa. 500.

The duties of the trustee are constant and continuous, and not at all dependent upon the coverture of Sarah Barrett. The trustee is to receive the net income of the property and pay it over.

For this purpose the legal title was given to him. It involved the necessity of management and care of the estate, and of preservation for those en-

titled in remainder. Bacon's Appeal, 57 Pa. 504; Rife v. Geyer, 59 Pa. 393; Key v. Scates, 37 Pa. 37; Stambaugh's Estate, 135 Pa. 585.

We think the testator's purpose, in part, was by means of this trust to protect the corpus of the estate for the parties entitled in remainder. The devise is expressly restricted to the devisee's natural life, with a contingent remainder in fee to the children living at the time of her death and to the issue of such as may then be deceased, leaving such issue.

Those entitled in remainder are not the heirs general in fee or in tail, but specific children and issue of deceased children; and even if the children would take as heirs, the trust will be preserved to protect the contingent remainderman, John Barrett. For a trust is never executed when its preservation is necessary to support a contingent remainder. Little v. Wilcox, 119 Pa. 439; Kuntzleman's Estate, 136 Pa. 142.

The rule in Shelly's case has no application where the remainder is to the "children" of the life tenant, and to the issue or children of such children as shall be deceased at the time of his death. Watson's Appeal, 125 Pa. 340; Fetherman's Estate, 181 Pa. 349; Mannerback's Estate, 133 Pa. 342; Sims' Estate, 130 Pa. 451.

In Delbert's Appeal, 83 Pa. 462, the facts of which are similar to those of the case at bar, viz: Testator devised an eighth of his estate to each of his daughters for their lives, and after their decease to all their children then living, and the issue of such of them as may then be dead, their heirs and assigns forever, in equal parts, such issue taking and dividing among themselves such share only as their deceased parents would have taken if living; provided that the portions of his estate thus devised, should remain during the lives of the daughters respectively in the care and management of his executors, in trust, to receive and pay over the income to his said daughters for their sole and separate use, free from any liability for the debts of their husbands. It was held, that the gifts to the daughters were restricted to their lives, with a contingent remainder in fee to the children of each, living at the time of her death, and the issue of such as may then be deceased leaving such issue; and that it was the intention of the testator to create a trust to preserve the corpus of the estate for those in remainder, and this intention was not to be defeated by the void provision for the separate use of the daughters, which was but an incident and not the main purpose of the trust. Ingersoll's Appeal, 86 Pa. 240.

Therefore, we are of the opinion that the will of Eliza Barrett created a valid active trust, which is not executed by the statute of uses, and, consequently, the plaintiff is unable to convey a good title in fee of the premises.

Judgment for the defendant.

OPINION OF THE SUPREME COURT.

The gift was to the executor to pay the net rents to Eliza for life, and, at her death, to convey the land to "her children, or the issue of such children as shall be dead," etc. It is clear that Eliza takes only a life estate. The remainder is to her children, or the issue of children who shall be dead at her death. If she should die without issue, the conveyance is to be made to the executor himself. "Die without issue" imports what the context shows, a definite failure of issue. The rule in Shelly's case is not applicable. This is reason enough for the conclusion that Eliza Barrett cannot convey a good title.

The discussion of the learned court below makes it unnecessary to consider the trust. That trust is active, and no act of Eliza Barrett can cast it off. Her conveyance would pass at most, only her right to receive the net rents

defendant, Henderson, by the presence of the covenants in the deed to his grantor, is clearly charged with notice and with the clear intention of the parties to create a covenant running with the land. He has no equity in any way superior to his grantor.

The same may be said of the second covenant to always repair the boundary fence. The word "always" shows an intention to attach the covenant in question to the land. The grantee could not have intended that he himself, his children, his grandchildren, and so on indefinitely, should be personally charged with the duty of maintaining the fence. Fortunately, for posterity, a man cannot compel his descendants to perform all the services which he lays upon them. The result of such a policy would be, virtually, slavery. He may give them property, upon condition that they perform certain services. But they have an election. To say that this covenant does not run with the land, and to compel a man and his heirs to personally perform a service, would be to enforce upon them not the performance of the services if they chose to acept the gift, but the performance of the service without the gift.

To show the further absurdity of such a proposition, we think is needless. On the other hand, the logic and justice of holding it to be attached to the land are clearly evident. Every subsequent grantee or devisee of the property so charged, takes with full notice of the incumbrance; the grantee receives the incumbered land at a decrease in price which will compensate him for his burden; the devisee pays nothing, and can reject or accept as he sees fit.

To summarize, if we hold the covenants in this case to run with the land, we work no injustice to grantee or devisee, and give justice to the plaintiff; if we hold them not to run with the land we give more than justice to the grantee or devisee, and work injustice to the plaintiff.

It was objected by the attorney for the defendants that Cross was improperly joined as party defendant. Holding as we do, that the covenants in question run with the lands, we must hold that breaches occurring after the termination of ownership, cannot affect Cross. The real party in interest is Henderson, who is alone liable. In accordance with the power conferred upon us by statute, we hereby order that the name of Cross be stricken from the record.

The case is submitted to the jury with instructions to find for the plaintiff such damages as they think proper. Any damages already caused are to be taken into consideration. Also, such annoyances as have been caused to plaintiff in consequence of the breach, and decrease in the value to him of the property adjoining.

OPINION OF THE SUPREME COURT.

Cross covenanted never to sell liquor on the premises, and to maintain a boundary fence. He, a year later, conveyed the land to Henderson, who has removed the fence and begun to sell liquor.

The covenant for the fence, runs with the land. Kelly v. Nypano R. R. Co., 200 Pa. 229; Scowden v. Erie R. R., 26 Super. 15. So does that not to sell liquor. Snyder's License, 2 D. R. 785; Fanning's License, 23 Super. 622; Donovan's License, 9 Super. 647 It was, therefore, incumbent on Henderson to keep them, and for his failure to do so, he is liable to an action.

The damages recoverable are not for the supposed permanent diminution of the value of the premises; but only compensation for the injury down to the bringing of the action, occasioned by the failure to maintain the fence and by the sale of the liquor. Should the recovery in this action not result in the discontinuance of the violations of the covenants, other actions may be brought.

Judgment affirmed.

BOOK REVIEW

THE CONFLICT OF LAWS. *By Francis Wharton, LL. D. 3d edition, by George H. Parmele, Rochester, N. Y. Lawyers' Co-operative Publishing Co.*

Like all the works of Francis Wharton, his treatise on Conflict of Laws is conspicuous for scholarship, broad generalization, careful analysis and copious exploration of authorities. Since the first edition of this work, the volume of decisions has immensely increased, and the additions made to his latest, the second edition, by the accomplished editor of the present, indicate how fertile the courts have been in solving questions of this class during the twenty-four years that have followed its appearance.

The matter added by Mr. Parmele is of the first importance. It is so incorporated as not to mar the continuity of the discussion, and the notes teem with authorities for almost every proposition. Striking additions on the subject of legitimation, corporations, marriage, personal incapacities, taxation, may be mentioned. The supplementary discussions, under the head of obligations and contracts, are much more extensive than the original.

The writer of this notice has frequently been compelled to spend hours of research on questions, the solution of which may be attained promptly by the aid of these fine volumes. In this age of insterstate and international travel, suits in one jurisdiction founded on contracts or torts made or committed in another, are immensely more numerous than ever before in the world's history. There is scarcely a county court so remotely situated, that its attorneys do not have, in the course of a year, many cases requiring the application of a law other than that of the forum. It is not excessive to say that the 3d edition of Wharton's Conflict of Laws is one of the most important and one of the most deeply interesting of all the progeny of the prolific law press of the United States, born within recent years. It can be unstintedly commended to the profession.

HANDBOOK OF THE LAW OF PUBLIC CORPORATIONS. *By Henry H. Ingersoll, LL. D. West Publishing Co., 1904.*

This book begins with two banal panegyrics, one on C. J. Marshall, and another on J. F. Dillon, and in a note on page 3, is a remark upon corporations sole, that is neither historically exact nor free from flippancy. The prejudice awakened by these was, however, quickly dissipated by an examination of the table of contents and of the treatment of several of the more important topics. The chapters on quasi-corporations are exceedingly good and give information not easily accessible. They furnish an illuminating discussion of the creation of counties, townships, parishes, school districts, of their officers, of their powers; particularly good is the treatment of their fiscal management. Of municipal organizations there are chapters on the organization, the powers, the officers, the ordinances, the contracts; on improvements made by them, their police power, their streets, sewers, parks, public buildings; their liability on contracts and for torts; their money raising power. The discussion of taxation is clear and ample. The division of the work which is devoted to quasi-public corporations, embracing railroads, telegraphs, telephones, water and gas companies, suffers from compression and brevity. The work is succinct, its matter scientifically arrayed, its citations copious, its statements clear and precise. We know no work on its subject that is comparable with it in these important respects. Though it is in the "Hornbook Series," every lawyer ought to have it, and what is more, read it through with care. He will find it no less interesting than edifying. Of such books there are never too many.